

## DOCKET SECTION

BEFORE THE  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268-0001

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POSTAL RATE AND FEE CHANGES, 1997

Docket No. R97-1

RESPONSE OF THE UNITED STATES POSTAL SERVICE  
TO APPEAL OF THE ALLIANCE OF NONPROFIT MAILERS  
FROM PRESIDING OFFICER'S RULING NO. R97-1/86  
(January 28, 1998)

Pursuant to Presiding Officer's Ruling No. R97-1/88, the United States Postal Service hereby provides its response to the January 16, 1998, Appeal of the Alliance of Nonprofit Mailers from Presiding Officer's Ruling R97-1/86 (*hereinafter* "ANM Appeal"). It is the position of the Postal Service that the Presiding Officer's initial determination, namely, that the ANM discovery that was the subject of the motion was posed improperly, and that the Postal Service therefore is not required to respond, is correct, and that the Alliance's appeal does not undermine the soundness of that determination. Accordingly, the Postal Service respectfully asks that ANM's appeal be dismissed.

This dispute arose with ANM's December 9, 1997, filing of interrogatories to the Postal Service concerning the Revenue, Pieces and Weight System and the In Office Cost System. The Postal Service objected, and ANM moved to compel responses to five of the interrogatories on December 22, 1997. ANM's claims have included that its discovery should be permitted under Rule 2E of the Commission's Special Rules of Practice, and that its professed willingness to obtain its requested information by means of a technical conference would obviate any burden in responding to the discovery. In

Presiding Officer's Ruling No. R97-1/86, the Presiding Officer noted that ANM's interrogatories are "arguably supported, rather than precluded, by Special Rule 2.E.," Presiding Officer's Ruling No. R97-1/86 at 7, but that ANM's delay in posing its discovery requests, coupled with the burden that would be involved in providing the responses sought by ANM, argued against requiring the Postal Service to provide responses.

Under the its Rules of Practice, the Commission may dismiss an appeal of a Presiding Officer's ruling, after certification of that ruling, "if it determines that (i) the objection to the ruling should be deferred until the Commission's consideration of the entire proceeding or (ii) interlocutory review is otherwise not warranted or appropriate under the circumstances. The Postal Service considers that review of the Presiding Officer's ruling is not called for in this circumstance. Despite ANM's claims of the compelling nature of its discovery dispute, in the end, the issue at the heart of its dispute with the Postal Service is a simple procedural question: whether the Postal Service should be required to respond to discovery filed grossly out of time. The *Presiding Officer has correctly held that it should not, and the Postal Service agrees* that due process is best served by requiring *all* participants to adhere to the Commission's procedural requirements.

A reading of ANM's January 16 appeal makes the questions at issue appear anything but simple. The fact is, however, that the current dispute arose out of Postal Service objections to a series of ANM interrogatories aimed at the Postal Service's data systems. The interrogatories, ANM/USPS-20-23, 25-26, were posed on December 9,

1997. The data systems that are the targets of this discovery have been available for review, analysis and discovery since July 10, 1997, when the Postal Service filed its direct case in this proceeding, *five months prior to ANM's discovery requests*. The Postal Service made available witnesses Pafford and Degen, who testified to the design, operations, and results of, respectively, the RPW system and the IOCS. Witness Pafford was available for oral cross examination on October 16 and December 2, 1997; Witness Degen was available for oral cross examination on October 21 and December 4, 1997. In fact, ANM not only took part in the oral cross-examination of witness Degen, but, on October 21, asked him about instances of misrecording of IOCS tallies, Tr. 12/6634-38, and on December 2, asked about the very issue raised in its belated discovery. Tr. 17/8194-97. Although ANM asked witness Degen about the operation of the RPW system, Tr. 17/8193, 8195-96, it never posed this line of inquiry to witness Pafford, either in oral or written form.

Why, then, did ANM wait nearly five months to file its interrogatories? In its January 16 appeal, for the first time, ANM suggests that it is the fault of the *Postal Service* that their discovery was so remarkably tardy. ANM cites its contention with the Postal Service's initial filing of material in library references<sup>1</sup> as constituting "circumstances [that make] the timing of ANM's discovery efforts . . . more than reasonable." *ANM Appeal* at 5. The glaring flaw with this claim is that the information about which ANM belatedly seeks to inquire was not subject to ANM's evidentiary

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<sup>1</sup> This appears to have become ANM's evidentiary *el niño*, now responsible for any and all procedural, discovery, and evidentiary disputes.

quarrels. The testimony describing the RPW system and the IOCS was not submitted in the form of "voluminous supplemental testimony,"<sup>2</sup> *ANM Appeal* at 5. It was not the subject of any "massive and repeated errata." *Id.* It consists of straightforward explanation and documentation of the systems' designs and operations; the testimony at issue is not subject to "the workpaper requirements of subsection 54(o) [of the Commission's Rules of Practice], which requires a road map to the data and citations sufficient to enable a reviewer to trace any number used but not derived in the associated testimony and exhibits." *Id.* In short, the RPW and IOCS testimony at which ANM launched its December 9 discovery was virtually the identical presentation made by the Postal Service on July 10, 1997.

ANM's appeal also attempts to fashion a new rationale for untimeliness of this particular discovery. In the body of its appeal, ANM describes its theory (more fully recounted in the testimony of its witness, Dr. John Haldi, ANM-T-1) for the cost behavior of nonprofit Standard (A) mail. Then, ANM makes the innovative argument that, because the Postal Service did not divine ANM's theory and incorporate it into Postal Service witnesses' discovery responses early in the proceeding, the Postal Service was therefore suppressing information and affirmatively forestalling ANM's discovery formulation. See *ANM Appeal* at 6-7. ANM has no basis for making such a

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<sup>2</sup> On December 2, Witness Pafford, USPS-ST-48, formally sponsored 11 pages of Library Reference USPS-H-89, regarding the RPW system, along with more general information on the Postal Service's statistical programs guidelines and copies of mailing statement forms. On December 4, Witness Degen, USPS-ST-47, formally sponsored 8 pages of Library Reference USPS-H-89, regarding the IOCS. The Postal Service moved these portions of LR-H-89 into evidence pursuant to Presiding Officer's Ruling No. R97-1/56 (November 5, 1997), which granted the motion of the National Newspaper Association, *not* ANM, to require the Postal Service to provide a witness to sponsor LR-H-89.

claim. Moreover, with this tactic, ANM attempts to obscure its simple discovery dispute by elevating its conjecture on nonprofit costs to the level of fact.

ANM asserts that, “[a]s noted on pages 2-3 of the [Presiding Officer’s] ruling, a mismatch between the IOCS and RPW data for nonprofit mail appears to have caused the Postal Service to overstate the costs attributable to Nonprofit Standard (A) mail . . . the existence of the mismatch does not appear in dispute . . .” *ANM Appeal* at 2. ANM characterizes a portion of Presiding Officer’s Ruling No. R97-1/86, that recounts ANM’s own arguments, as a statement of the Presiding Officer, and goes on to argue that its own theory “does not appear in dispute.” This characterization is not only plainly incorrect, but ANM’s disappointing reliance on such sleight-of-hand only belies its lack of confidence in the soundness of its procedural arguments.

ANM has presented its theory on nonprofit costs in the testimony of witness Haldi, ANM-T-1. The proper treatment of this theory is for the Postal Service to rebut it with testimony of its own, if the Postal Service determines that such rebuttal is warranted by the state of the record in this proceeding. Instead, ANM has, in its *Appeal*, unilaterally recast its theory as “fact”, and now attempts to use the “fact” to threaten the Commission with an “evidentiary train wreck at the end of the case.” *ANM Appeal* at 4.

The true fact is that, as the Presiding Officer recently noted, “the case must move forward with deliberate speed as we are operating on a compressed schedule. Therefore, discovery cutoff dates must be respected and Special Rule 2.E. will continue to serve the limited purpose of enabling intervenors to obtain certain information from

the Postal Service for the purpose of rebutting other intervenors' cases." Presiding Officer's Ruling No. R97-1/89, Granting in Part Motion of Douglas F. Carlson to Compel Responses to Interrogatories (January 27, 1998). ANM's interpretation of Presiding Officer's Ruling R97-1/86, regarding its use of Special Rule 2E, is misplaced. The Presiding Officer held that, although the interrogatories were "*arguably supported*", Presiding Officer's Ruling R97-1/86 at 7 (not "permissible", as the *ANM Appeal* claims, at 4), under the Rule, ANM was required to comply with the timeliness and burden requirements of the Commission's Rules. Even if it could be argued that, having failed to meet the appropriate discovery deadlines for the inquiries it has submitted related to the Postal Service's direct case, ANM is entitled to reasonably anticipate the need for *rebuttal to intervenors' cases under Rule 2E*, see Presiding Officer's Ruling No. R97-1/86, at 6, intervenors' cases have now been filed, and ANM has made no argument that it is entitled under Rule 2E to pursue its discovery in order to rebut any particular intervenor. Even if it had been able to make such a showing, moreover, its appeal would still have to overcome the Postal Service's burden objection under Commission standards. In this respect, however, its appeal also fails.

ANM's makes three arguments regarding the Postal Service's claims of burden in responding to its tardy discovery. None of these arguments have merit. First, ANM claims that the Postal Service should have performed the analysis it requested in preparing its direct case. This argument fits neatly into ANM's claim that the Postal Service should have predicted ANM's theory of nonprofit Standard (A) cost behavior. This argument misses the fact that ANM's theory is only theory, and the Postal Service

should not now be forced to investigate ANM's allegations, simply because ANM has made the assertions in the testimony of Dr. Haldi.

Next, ANM asserts that the Postal Service's claims of burden in searching for the information requested by ANM should be dismissed because the Postal Service declined to hold a technical conference to discuss the substance of ANM's discovery request, "nor has the Postal Service proposed any less burdensome alternative to answering the question." *ANM Appeal* at 7. As undersigned counsel explained to counsel for ANM when the technical conference was first proposed, the Postal Service did not feel that a technical conference would be appropriate, given the Postal Service's other objections (i.e., other than burden) to the line of discovery. As was also discussed with counsel for ANM, the process of gathering the Postal Service personnel necessary to fully discuss the substance of the discovery requests was certain to be, in itself, extraordinarily painstaking. Finally, ANM makes no reference to any requirement for the Postal Service to "propose[] any less burdensome alternative . . ." as it now claims is necessary.

Finally, ANM now makes a claim of *relative* burden that the Commission should consider in assessing the Postal Service's burden claim in responding to discovery. Nowhere does the ANM cite any requirement for the Presiding Officer to take such a measurement into account, and this portion of ANM's appeal should have no bearing on the Commission's consideration of the it.

Due process is not served by permitting ANM to file egregiously late discovery months after the close of the Postal Service's direct case, simply because it asserts that

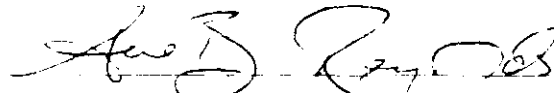
its interrogatories are important. Of the many participants in this proceeding who filed interrogatories to the Postal Service and other participants, it is difficult to imagine that any of them felt that such discovery was not at least as compelling as ANM claims is this line of questioning. For ANM to be permitted to circumvent the standards in the Commission's Rules of Practice makes those standards meaningless.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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January 28, 1998



## CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.



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January 28, 1998